Supreme Court, U.S.
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No. 10-251

IN THE
# Supreme Court of the United States

EXPERIAN INFORMATION SOLUTIONS, INC.,
*Petitioner,*

v.

MARIA E. PINTOS,
*Respondent.*

**On Petition for a Writ of Certiorari To the United States Court of Appeals For the Ninth Circuit**

## REPLY BRIEF FOR PETITIONERS

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## CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari, pursuant to Supreme Court Rule 29.6, remains accurate.

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## REPLY BRIEF FOR PETITIONER

As the Petition demonstrated, the Ninth Circuit's holding—that "credit transaction[s] involving the consumer" under 15 U.S.C. § 1681b(a)(3)(A) include only transactions that "the consumer *initiate[d]*," Pet. App. 15a-16a (emphasis added)—is squarely contrary to the plain text of the statute, which makes clear that the "credit transaction[s]" in § 1681b(a)(3)(A) include "credit . . . transactions that are not initiated by the consumer." *See* 15 U.S.C. § 1681b(c)(1); Pet. 9-16.

Instead of defending the holding below, Respondent Maria E. Pintos attempts to change the subject, by (1) denying (inaccurately) that the Ninth Circuit so held, and (2) seeking to justify the result below on alternative grounds. This effort to divert attention from the Ninth Circuit's holding is a telling concession that the decision below cannot be defended. The Court should summarily reverse, or, in the alternative, grant certiorari to correct the Ninth Circuit's extreme departure from the text of the Fair Credit Reporting Act (FCRA) and established principles of statutory interpretation.

### A. Respondent's Failure To Defend The Decision Below Highlights The Need For Review And Correction

1. As the Petition explained, the Ninth Circuit's holding that a "credit transaction involving the consumer" under § 1681b must be one "the consumer initiate[d]," Pet. App. 15a, is squarely contrary to § 1681b(c)(1), which establishes that § 1681b(a)(3)(A) *does* include "credit . . . transactions that are not initiated by the consumer." *See* Pet. at 9-16. As the dissenting judges rightly pointed out, this

interpretation is so plainly "foreclosed by the plain language of the statute" that it "flunks Statutory Interpretation 101." Pet. App. 5a, 8a (Kozinski, C.J., dissenting from denial of reh'g en banc).

Rather than defend this indefensible holding, Respondent instead pretends—once she finally addresses the Ninth Circuit's holding, on page 19 of the Opposition—that the court below never held that a "credit transaction involving the consumer" under § 1681b requires a consumer-initiated transaction. Opp. 19-20. This is demonstrably wrong: the Ninth Circuit expressly held that—aside from its unexplained exception for judgment debts—there is a "requirement that the consumer initiate the transaction." Pet. App. 15a. And, lest there be any doubt, the panel majority expressly summarized its holding as imposing such a requirement:

> PCA was not a judgment creditor. Its claim against Pintos did not result from a *transaction initiated by* Pintos. *We conclude, therefore*, that § 1681b(a)(3)(A) did not authorize PCA to obtain the credit report on Pintos.

Pet. App. 17a (emphasis added); *see also id.* at 16a ("[T]hat Pintos owned the car that was towed did not mean that she initiated the credit transaction.")

Likewise, the dissent clearly understood the majority as so holding, *see* Pet. App. 5a-6a, and the majority made no claim that its holding was mischaracterized.

Further, Respondent is unable to identify any other ground on which the Ninth Circuit purportedly decided the case. She vaguely asserts that the court's "focus was always on what it means for something to

be a credit transaction," Opp. 20, but points to nothing in the opinion purporting to define "credit transaction" or to decide the case on any such basis. Indeed, the Ninth Circuit took it as a given that there *was* a "credit transaction" when P&S provided towing services before seeking payment, and focused instead on whether Respondent had initiated it. *See, e.g.*, Pet. App. 16a ("[T]hat Pintos owned the car that was towed did not mean that she initiated *the credit transaction*. . . . Pintos was not a 'participant' in *the credit transaction*, but was 'oblige[d] to become associated' with it after her car was towed.") (emphases added) (citations omitted).

In short, Respondent's attempt to deny the square holding below speaks volumes about the magnitude of the Ninth Circuit's error and the need for correction.

2. Respondent has good reason for attempting to rewrite the holding below. As she effectively concedes, Opp. 20-21, the Ninth Circuit's actual holding—that § 1681b(a)(3)(A) requires consumer initiation—cannot be reconciled with the plain text of § 1681b(c), which demonstrates that "credit transactions involving the consumer" under § 1681b(a)(3)(A) include "transactions that are *not* initiated by the consumer." *See* Pet. 9-12; Pet App. 6a-7a (Kozinski, C.J., dissenting from denial of reh'g en banc).

Respondent's only attempt to address the import of § 1681b(c) is insubstantial. She is of course correct that the prescreening requirements of § 1681b(c) do not apply here, Opp. 20—§ 1681a(m)'s exemption of account review and collection confirms that much. But, as pointed out in the Petition (at 12-13)—and

not addressed by Respondent—this misses the point. Section 1681b(c) is relevant not because its provisions apply here—there is no claim of that—but because its text decisively forecloses the Ninth Circuit's reading of § 1681b(a)(3)(A). *See, e.g., Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004). Tellingly, Respondent does not even attempt to explain how § 1681b(a)(3)(A) can possibly be read to require consumer initiation in light of § 1681b(c).

Further, Respondent errs in depicting § 1681b(c) as *creating* a permissible purpose for a narrow set of "non-consumer-initiated transaction[s]." Opp. 22. Section 1681b(c) does not *create* a permissible purpose at all. Instead, it places limits on the provision and use of credit reports obtained under the *existing* permissible purposes of § 1681b(a)(3)(A) or (C) in connection with certain transactions not initiated by the consumer, thereby confirming that—contrary to the Ninth Circuit's holding—§ 1681b(a)(3)(A) does not *itself* require consumer initiation. *See* Pet. 11-12.

3. Respondent completely ignores Petitioner's argument that when Congress wanted to include a consumer-initiation requirement it said so expressly—namely, in § 1681b(a)(3)(F)(i) (limiting "legitimate business need" permissible purpose to "a transaction that is *initiated by* the consumer") (emphasis added). *See* Pet. 14-15. Respondent offers no explanation for how a consumer-initiation requirement can be read into § 1681b(a)(3)(A) where Congress specifically chose not to include one expressly. *See, e.g., Bates v. United States*, 522 U.S. 23, 29-30 (1997).

4. Nor does Respondent attempt any response to Petitioner's demonstration that the Ninth Circuit's reading of § 1681a(b)(3)(A) as requiring consumer-initiated debts is contradicted by its own exception for judgment debts. *See* Pet. 15-16.

In sum, Respondent fails to rebut any of the multiple ways in which Petitioner demonstrated that the decision below flagrantly departs from both the statutory text and binding interpretive principles.

### B. Respondent Cannot Salvage The Ninth Circuit's Decision By Resurrecting Alternative Arguments Rejected Below

Respondent seeks to avert review by offering alternative arguments that depart from the holding below. The Ninth Circuit—even as it discarded one rationale for its decision and substituted another—properly declined to adopt these arguments when Respondents proffered them. None of them has merit, and none mitigates the pressing need for this Court's intervention.

1. Respondent contends that this case did not involve a "credit transaction," in that "credit" means the right to defer payment for funds, goods, or services. Opp. 13. Here, she argues, there was no deferral of payment, because the towing company and PCA "insisted on immediate 'full payment.'" Opp. 14. This simply misunderstands the concept of deferred payment. The towing company did not insist on payment before providing its services (or contemporaneously); rather, PCA insisted on full payment only after the fact—the very definition of deferred payment. And the provision of services

without prior or contemporaneous payment is plainly an extension of credit.[1]

Respondent appears to believe that deferred payment for services is not an extension of "credit" when the service provider—having previously provided services—later demands "full payment." *Id.* at 14. She offers no support for such a definition, which, if accepted, would appear to exclude a wide swath of deferred payment arrangements from the definition of "credit."[2] As noted earlier, even the majority below apparently rejected this radically narrow definition and accepted that this case involved a "credit transaction." *See* Pet. App. 16a.

2. Respondent's argument that she did not have an "account" with P&S or PCA because they had not "voluntarily" entered into a "formal business arrangement" and had no "regular dealings or

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[1] The portion of the record Respondent cites as the demand for "immediate 'full payment'" is a collection notice sent by PCA five months after P&S towed her car. ER 128 (Experian). She also points to a notice of pending lien sale sent by P&S more than a week after it provided towing services (which, it is worth noting, did not demand payment). ER 155 (PCA).

[2] The two circuit court decisions that Respondent cites—both interpreting different statutes—are not to the contrary. *Shaumyan v. Sidetex Co.*, 900 F.2d 16 (2d Cir. 1990) dealt with the Equal Credit Opportunity Act and held that a contractor had not extended credit when it received "substantially contemporaneous" payment for its work. *Id.* at 18-19. And *Hahn v. Hank's Ambulance Service, Inc.*, 787 F.2d 543 (11th Cir. 1986) (per curiam), dealt with the Truth-in-Lending Act and held only that a late fee assessed for delinquency when a consumer fails to pay in full at the time the service is performed is not a "finance charge" and does not mean that the company has extended credit. *Id.* at 544.

services," Opp. 15, fares no better. Respondent points to no legal authority for her definition of "account," and, contrary to her assertion, nothing about the dictionary definitions she cites "presupposes a consensual arrangement between the parties, entered into voluntarily." *Id.*

Indeed, cherry-picking the fourth definition of "account" in Merriam-Webster's Collegiate Dictionary (Deluxe ed. 1998), Respondent skips over the more relevant *second* definition: "a: a record of debit and credit entries to cover transactions involving a particular item or a particular person or concern b: a statement of transactions during a fiscal period and the resulting balance." *Id.* at 11. This definition comports with the long-held understanding of both the lower courts and the FTC that "collection of an account" within the meaning of § 1681b(a)(3)(A) includes debt collection. *See, e.g.*, 16 C.F.R. pt. 600, app. § 604(3)(A) cmt. 1(A) (2002); *Hasbun v. Cnty. of Los Angeles*, 323 F.3d 801, 802 (9th Cir. 2003); *Phillips v. Grendahl*, 312 F.3d 357, 367 (8th Cir. 2002).

3. Respondent's alternative interpretations of the Act also fail to account for the use of credit reports to collect judgment debts, which even the Ninth Circuit agrees is a permissible purpose under § 1681b(a)(3)(A). Pet. App. 16a-17a; *see also Hasbun*, 323 F.3d at 803. The FTC has taken the same position. *See* 16 C.F.R. pt. 600, app. § 604(3)(A) cmt. 2. Like the court below, Respondent offers no explanation for how her definitions of "credit transaction" and "account" can coherently *exclude* a debt like the towing charges at issue here, but *include* the same debt once it has been reduced to

judgment. Indeed, she admits that her proffered definition of "collection of an account" would not allow the use of a credit report to assisting in collecting "tort judgments." Opp. 17. But she offers no justification for such a radical departure from the universally accepted "judgment creditor rule."[3]

4. Contrary to Respondent's assertion, Opp. 16, Petitioner's interpretation does not ignore the conjunctive nature of "and" or render "credit transaction" superfluous. Nor would it allow anyone "alleging they are owed money," *id.* at 25—such as a prospective tort plaintiff—to access a consumer's credit report. There is no contention that a mere claim for tort damages would constitute a "credit transaction" or permit access to the consumer's credit report under § 1681b(a)(3)(A). But the provision of goods or services for which payment will be deferred —such as emergency medical services, telephone service, or, as in this case, towing services— constitutes a "credit transaction," whether or not voluntarily initiated by the consumer.[4]

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[3] *See also Baker v. Bronx-Westchester Investigations, Inc.*, 850 F. Supp. 260, 262-63 (S.D.N.Y. 1994).

[4] *See, e.g., Edge v. Prof'l Claims Bureau, Inc.*, 64 F. Supp. 2d 115, 118 (E.D.N.Y. 1999) (unpaid hospital charges stemmed from "credit transaction involving" consumer); *Greenhouse v. TRW, Inc.*, No. 96 Civ. 1495, 1998 WL 61037, at *4 (E.D. La. Feb. 13, 1998) (permissible purpose to collect unpaid medical charges); *Korotki v. Att'y Servs. Corp.*, 931 F. Supp. 1269, 1277 (D. Md. 1996) (permissible purpose to collect noncontractual debt for construction services rendered without payment); *cf. Murray v. New Cingular Wireless Servs., Inc.*, 523 F.3d 719, 722 (7th Cir. 2008) (provision of telephone services prior to payment is credit transaction because "[d]eferred payment is 'credit'").

Respondent's interpretation, by contrast, offers an even more radical narrowing of the FCRA than the Ninth Circuit's holding, fully justifying the concerns raised by Petitioner, PCA, and *amici*. Respondent would limit the permissible use of credit reports to collection of debts such as "credit cards, mortgages, [and] charge accounts," Opp. 25—and would not allow their use for debts incurred through the provision of goods or services prior to payment, or apparently even some "judgments," (despite the well established judgment-creditor rule), *id.* at 17.

5. Such a radical narrowing of § 1681b(a)(3)(A)'s permissible purpose for account collection would hamper legitimate collection efforts and inevitably lead to an increase in the cost of consumer credit. As Judge Gould explained in his dissent: "Uniformity of treatment of creditors is useful and likely leads to lower credit enforcement costs to the benefit ultimately of consumers." Pet App. 8a; *see also* Brief of *Amici Curiae* Consumer Data Industry Association and Chamber of Commerce of the United States 10-16.

### C. The Decision Below Conflicts With The Interpretations Of Other Courts And The FTC.

In addition to being manifestly erroneous, the decision below conflicts with the longstanding approach of other courts that have treated debt collection as a permissible purpose, without regard to whether the credit transaction that gave rise to the debt was consumer-initiated. *See* Pet. 16-17 (citing cases).

Further, Respondent does not dispute that the Ninth Circuit's novel consumer-initiation

requirement conflicts with the FTC's interpretative guidance on § 1681b(a)(3)(A), which makes clear that lien creditors, like P&S and PCA, may obtain a credit report to facilitate collection. 16 C.F.R. pt. 600, app. § 604(3)(E) cmt. 4; *see also* Pet. 17-19. Instead, Respondent argues that the FTC's interpretation applies only where the transaction giving rise to the debt involved "credit." Opp. 34-35. But, as demonstrated above—and as the Ninth Circuit's actual holding presumed—the transaction in this case did involve "credit." Respondent offers no explanation for how the FTC's commentary can be squared with the Ninth Circuit's countertextual interpretation.

### D. Respondent's Attempt To Minimize The Need For This Court's Intervention Is Mistaken.

1. Respondent's argument that the Fair and Accurate Credit Transactions Act of 2003 (FACTA) amendments obviate the need for this Court's review, Opp. 26-27, is mistaken in two ways. First, FACTA has no bearing on whether the Court should summarily reverse the Ninth Circuit's extreme departure from the statutory text and established rules of statutory interpretation.

Second, as demonstrated in the Petition, the FACTA amendments have no relevance to the proper interpretation of § 1681b(a)(3)(A)—whether before or after FACTA. *See* Pet. 21. Respondent has no response to this demonstration. Indeed, her only argument under FACTA—which adopts a conventional definition of "credit" as a right "to defer payment of debt," 15 U.S.C. § 1691a(d)—is the same flawed argument she makes in the absence of

FACTA: that there was no "credit" granted to Respondent because P&S and PCA demanded "immediate full payment." Opp. 26. This argument, as shown earlier (*supra* at 5-6), misunderstands the concept of deferred payment. And it in no way turns on FACTA. *See also Murray v. New Cingular Wireless Servs., Inc.*, 523 F.3d 719, 722 (7th Cir. 2008) ("Deferred payment is 'credit' as the [FCRA amended by FACTA] uses that word.").

2. Contrary to Respondent's assertion, reversal would not create confusion or encourage other parties to seek "extra-statutory authorizations." Opp. 29. Petitioner's argument is well-grounded in unambiguous and irrefutable statutory text. It is the Ninth Circuit's departure from that text, without so much as an attempt to explain how its consumer-initiation requirement can be squared with § 1681b(c), that will sow confusion and encourage forum shopping. And because so many creditors are exposed to suit in multiple jurisdictions, the decision below, if allowed to stand, will skew decision-making by businesses nationwide.

3. Finally, the Ninth Circuit's reversal of a final judgment in favor of Petitioner and PCA and remand to the district court does not support Respondent's attempt to depict the case as "interlocutory." Opp. at 30-31. This Court routinely hears cases in an identical procedural posture. *See, e.g., United States v. Navajo Nation*, 129 S. Ct. 1547, 1554 (2009); *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 164-65 (2004); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 552-53 (2007). Indeed, in similar circumstances this Court heard *TRW Inc. v. Andrews*, 534 U.S. 19 (2001)—another FCRA case—

even though the Ninth Circuit had reversed and remanded for trial on additional defenses available to the consumer reporting agency.

## CONCLUSION

The petition should be granted and the court of appeals' judgment summarily reversed or, in the alternative, the case should be set for full consideration on the merits.

Respectfully submitted,

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